Forest Practices Code Enforcement in Upper Bridge River, Northwest of Gold Bridge, BC

Complaint Investigation 950088

October 1999

FPB/IRC/21

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The Investigation

The complaint was filed by an environmental organization, the Western Canada Wilderness Committee, which was concerned that harvesting in the Upper Bridge River area would impact on an adjacent wilderness area. The Sierra Legal Defence Fund frequently acted on behalf of the Western Canada Wilderness Committee. For convenience, the Western Canada Wilderness Committee, the Sierra Legal Defence Fund and members of both organizations are collectively referred to as "the complainant" in this report.

In mid-August 1996, the complainant reviewed a series of operational planning documents for an area in Ainsworth Lumber Co. Ltd.'s (the licensee) Upper Bridge River operating area northwest of Gold Bridge, BC. The complainant also did a field inspection of forest practices in the area. The complainant was concerned that operational plans and forest practices did not comply with the *Forest Practices Code of British Columbia Act* and related regulations[1] (the Code). In regard to operational planning, the complainant informed the district of five concerns with the district manager's approval of the licensee's operational plans:

1. The district manager should not have exempted the licensee from a requirement to locate landings further than 30 metres from streams.
2. The district manager should not have exempted the licensee from producing terrain stability assessments.
3. The district manager should not have exempted the licensee from producing road layout and designs.
4. The district manager should not have allowed the licensee to continue road construction while required permits or operational plans were not in effect.
5. The district manager should not have varied riparian management area widths in the plan area.

The complainant advised the district that the licensee had contravened the Code by:

1. failing to adequately maintain roads;
2. failing to properly deactivate a road by removing a bridge;
3. failing to construct or maintain adequate road drainage systems; and
4. depositing slash in a watercourse.

The Board received a complaint on January 30, 1997. It was filed after the complainant concluded that senior officials in the Ministry of Forests were not giving its concerns adequate consideration. The complaint to the Board was not directed at operational planning or forest practices. Instead, it was about the district manager's and regional manager's response to the complainant's concerns about such planning and practices. The complainant maintained that government response was neither appropriate nor prompt.

1 Both the Act and the various regulations have changed significantly since the circumstances surrounding this complaint occurred. Section references are to statutes and regulations in force in the summer and fall of 1996.

Location of Complaint 950088 Upper Bridge River

Four issues were investigated:

1. timeliness of the district manager's and regional manager's investigation of allegations of Code violations;
2. adequacy of a regional investigation team's review of operational planning;
3. adequacy of the district manager's enforcement and regional investigation team's review regarding forest practices; and
4. the regional manager's enforcement obligations regarding forest practices.

The Board did not conduct an independent assessment of whether or not there had been Code violations in planning or field practices. The Board considered the expertise of those who investigated the complainant's concerns. In addition, the Board carried out some sampling of sites and files to assess the general reasonableness of the regional and district staff's conclusions.

Investigation Findings

A. Timeliness of the district manager's and regional manager's investigation of allegations of Code violations

On August 15, 1996, the complainant orally raised two concerns about forest practices in the Upper Bridge River area with the district and regional managers of the Ministry of Forests. On August 16th, a district compliance and enforcement group conducted an investigation in the field. That group was accompanied by a Ministry of Environment, Lands and Parks (MELP) staff person.

On August 22, 1996, the complainant wrote to the district manager about five forest planning concerns and two more forest practices issues. The district and regional managers reviewed the assertions, decided there was no risk of immediate damage to the environment and assembled a group (regional team) to do a detailed investigation. The regional team was made up of ministry personnel from outside of the district who had expertise in one or more of the issues of concern raised by the complainant. It included one Code specialist who met with district staff on August 26, 1996, to review the assertions of Code violations. The team also included two terrain experts: a professional geoscientist and a professional engineer. They evaluated roads and cutblocks near areas with potentially unstable or unstable terrain. Another professional engineer with expertise in forest road construction, maintenance and deactivation reviewed road and landing construction in the complaint area. The regional team also included a consultant who reviewed district files for information related to the complainant's assertions of Code violations. The regional team was in the field between September 11th and 20th, 1996, and team members submitted four reports between September 15th and 25th, 1996.

Finding 1:

The government appointed a regional team of professionals with relevant expertise to investigate the complainant's assertions about operational planning and forest practices. That was an appropriate response to the complaint in the circumstances.

The complainant was unaware of the ministry's response to its concerns at the time, but believes that the district compliance and enforcement actions and regional team investigations were neither prompt nor adequate. The complainant described forest planning and practice concerns to the regional manager by telephone on August 15th. The complainant contends that the notification should have resulted in an immediate investigation. Instead, the regional team was not assembled until after a detailed letter was submitted by the complainant a week later, on August 22nd. The complainant believes that a one-month delay in field investigation allowed the licensee to correct problems before the regional team arrived. The complainant also disputes the manager's initial conclusion about no risk of imminent damage to the environment. The area of concern had vulnerable ash soils and unstable terrain.

The complainant was also concerned that the regional team did not include trained compliance and enforcement personnel who could have recognized contraventions. However, on August 16, 1996, district compliance and enforcement staff did separately investigate some of the assertions about forest practices.

On balance, the Board finds that the district and region brought appropriate expertise in to investigate the complainant's assertions. Compliance and enforcement staff went on site immediately and a regional team was in the field within three to four weeks after written notification. That was a commendably rapid response time after the concerns were raised, given the nature of the asserted contraventions.

Finding 2:

The district manager and regional manager arranged an appropriate and timely investigation of the complainant's concerns.

Ministry staff did not inform the complainant of actions taken in response to the concerns. The complainant had tried to follow up, meeting with the district manager on August 26th and calling the regional manager on September 3rd. Neither official informed the complainant of the steps taken or planned to address the complainant's concerns. Even after the regional team had investigated and reported, the complainant was not informed. Communications with the complainant had effectively stopped by the end of August.

District staff complained that the complainant's staff were inappropriately aggressive and demanding. Complainant staff not directly involved with the local concerns sent a letter to the deputy minister of forests that specifically criticized the district and regional managers. At a public meeting in Lillooet, environmental groups distributed complainant literature that was strongly critical of the ministry and supported the complainant's findings of Code violations.

Articles appeared in the media and matters quickly became very polarized. The district manager and regional manager, subjected to such actions, sought legal advice. The Ministry of the Attorney General advised the complainant on October 2, 1996, to direct all further communication through the Ministry of the Attorney General.

Finding 3:

Ministry of Forests managers considered the complainant's demeanor with respect to the complaint to be inappropriate. They followed advice by legal counsel to limit communications with the complainant.

B. Adequacy of the regional team's investigation regarding operational planning

The complainant noted that approved operational plans in the Upper Bridge River included landings that were within the minimum distance of 30 metres from streams specified in the *Operational Planning Regulation*[2]. The district manager could approve such encroachment, but only if two conditions were satisfied. There could be no other practicable alternative location and the landings could not "create a high risk of sediment delivery to the stream."

The regional team confirmed that the district manager had considered the risk of sediment delivery. He had considered the risk to be low. The team field checked the landings and agreed. The Board reviewed the documentation and also checked several of the landing locations in the field. The Board was satisfied that the landing locations did not create a high risk of sediment delivery to nearby streams.

The district manager had also considered whether there were practicable alternative locations farther away. He had decided that there were none, in part because there were a large number of streams in the vicinity. However, he restricted the meaning of "practicable" to be only what was possible given the equipment to be used by the licensee – in this case, short spars for yarding. Short spars produce shallower deflection angles, reducing the distance over which logs can be raised above the ground. They also are less likely than tall spars to clear terrain irregularities such as small hills and gully banks. There is increased risk of soil disturbance with yarding distance so there is less flexibility in landing location for short spars. If short spars were to be used, some landings had to be located within 30 metres of a stream. The regional team applied the same equipment restriction as the district manager had done. Once they accepted short spars as a limiting factor, the regional team agreed that there were no practicable alternatives to the landing locations.

The Board considered the intent of the Code's restriction on landing locations. Section 34 of the *Operational Planning Regulation*[3] dealt with minimizing soil exposure due to landings. It clearly set a general rule that no landings were to be proposed within 30 metres of any stream. The district manager's power to waive that requirement is, in the Board's view, to be used sparingly. Caution was especially important in the circumstances of this complaint because landing

[2] Section 34(2).

[3] The law has become less restrictive since this complaint arose. There has been no such restriction in the *Operational Planning Regulation* since June 1998. A similar requirement now appears as section 15 of the *Timber Harvesting Practices Regulation*, but is restricted to fish streams and streams in community watersheds rather than all streams.

locations did not have to be specified in operational plans until the detailed stage of the logging plan[4]. The public and resource agencies, in reviewing forest development plans, would have assumed that the minimum Code setback of 30 metres from streams would apply. If, at the logging plan stage, a licensee proposed less distance, that would normally not be considered by, or explained to, reviewing agencies or the public. The district manager had to decide whether a waiver could be allowed while conserving forest resources. In making that decision, all reasonable alternatives should have been considered and the reasoning for allowing encroachment documented.

In the circumstances of this complaint, there were two conditions that had to be met. It was not enough that proposed landings would not create a sedimentation risk; there had to be no practicable alternative location. The licensee and district manager interpreted "practicable" to be practicable with the equipment specified by the licensee. The Board disagrees with that restriction. The Code requires that landings be kept more than 30 metres from streams if there is a practical way to do so. The practicality of bringing in tall spars should have been considered by the district manager.

The complainant maintained that, with proper planning and alternative harvesting equipment, landings close to streams could, and should, have been avoided. However, the actual complaint only concerned the adequacy of government response, so the Board did not examine whether there actually were practicable options in the circumstances.

Finding 4:

The district manager limited his discretion when he considered only the short spar yarding equipment proposed by the licensee in seeking practicable alternatives. The district manager did not adequately consider the alternatives to locating landings away from streams.

The complainant also asserted that the district manager had exempted the licensee from completing terrain stability assessments required under the *Forest Road Regulation*[5]. The regional team found that terrain assessments had been carried out prior to road construction on roads as required. The complainant claimed to have carried out a comprehensive file review but found no terrain assessments. The Board found terrain assessments in a sampling of the district files and accepted the regional team's conclusions.

Finding 5:

The regional team adequately investigated whether the district manager had exempted the licensee from producing terrain assessments. The team concluded that there had been no exemption and that terrain assessments had been produced. The Board accepts the regional team's conclusion.

The complainant also believed that the district manager had improperly exempted the licensee from completing road location surveys for road layout and designs required by the *Forest Road*

[4] Since June 1998, section 39(4)(a)(xii) of the *Operational Planning Regulation* requires that the approximate locations of landings be shown earlier in the operational planning process, in the silviculture prescription.

[5] Section 3, now section 4.

Regulation[6]. That regulation generally requires a licensee to have a road layout and design approved before starting road construction. However, the district manager could make exemptions for short roads as long as there would be little or no impact on other forest resources[7]. The regional team confirmed that the district manager had exempted the licensee from completing road location surveys for three roads. The regional team agreed with the district manager's conclusion that there would be little impact on other resources. The team did not comment on the length of the exempted roads because the ministry maintains that the decision of whether or not a road is "short" is purely the district manager's to make.

Finding 6:

The regional team reported that there were low environmental risks along the roads exempted from road location surveys.

The Board disagreed that the decision on road length was at the discretion of the district manager, so the Board considered the length of exempted roads. The Board found that only short segments of up to 180 metres of each road were actually located on such steep slopes that road location surveys would be required. That complied with the Code. However, the district manager did not specify the short segments within each exempted road. Instead, he chose to simply exempt large portions of three entire roads from survey requirements. That caused confusion and concern for the complainant.

Finding 7:

The district manager's exemptions of road segments from the requirement for road location surveys complied with the Code.

The complainant also asserted that the district manager had allowed road construction to proceed without an approved operational plan or permit. The regional team investigated and found all of the road construction had been properly authorized. The Board found some approved plans and permits concerning roads in the complaint area during a sampling of the district files and accepted the regional team's conclusions.

Finding 8:

The regional team adequately investigated the licensee's authorizations to construct roads and found that road construction had been appropriately authorized. The Board accepts the regional team's conclusion.

The complainant asserted that the district manager had allowed decreased riparian management area widths, contrary to the *Operational Planning Regulation*. The regulation allowed the district manager, with the agreement of a designated environment official, to vary the width of the riparian area from minimums specified in the regulation[8]. The regional team found that riparian areas had been increased in width, not decreased. Logically, environment

[6] Section 3, now section 4.
[7] Section 5(2), now 6(3).
[8] Section 73, now section 62.

official agreement should not be required to increase protection for riparian areas. In any event, the regional team confirmed that a designated environment official had reviewed the riparian management areas in question in the field prior to the complaint and was satisfied with what was proposed. The Board confirmed the regional team's findings.

Finding 9:

The regional team adequately investigated the approvals of variations of riparian management area widths and concluded that all were increases beyond Code minimums.

C. Adequacy of the district manager's enforcement and the regional team's review regarding forest practices

In addition to the operational planning issues, the complainant raised four forest practices issues in the August 22nd letter to the district. District compliance and enforcement staff responded to the road drainage and debris deposition concerns. The regional team responded to concerns about road maintenance and deactivation. The Board assessed the adequacy of those responses.

On August 16th, two district compliance and enforcement staff and a habitat protection officer from the Ministry of Environment, Lands and Parks (MELP) looked into the two forest practices concerns raised by the complainant on August 15th. They examined the adequacy of drainage systems of a road under construction and if slash had been deposited into a stream along the same road. They concluded that the licensee's forest practices did not comply with the Code. However, the MELP official believed that there was no damage to the environment and confirmed that in a letter to the district. The compliance and enforcement officials considered issuing a stop work order, but decided against it because there was no environmental damage and the installation of permanent drainage structures was imminent. Instead, they issued written instructions to the licensee to correct the situation. They also considered alternatives such as a fine or administrative penalty but decided that the infractions did not warrant such action. Instead, the officials informed the licensee of the need for corrective work immediately after the site inspection, first by telephone and then by letter. A follow-up inspection on August 21st confirmed that the licensee had carried out the instructions.

The Board finds that district response to the complainant's concerns about the adequacy of road drainage and about slash in a stream was very prompt. Non-compliance was identified, enforcement options were considered and corrective instructions were issued. There was a follow-up inspection to confirm that the corrective work had occurred. Such actions were appropriate and commendable in the circumstances.

The *Forest Road Regulation*[9] required a person building a road to "...build drainage systems... concurrently with subgrade construction and ensure that the drainage systems are fully functional." Drainage systems were not functional when the complainant inspected the road. However, the compliance and enforcement personnel decided that was not necessary because road subgrade construction had not yet actually begun. They considered the existing road to be

[9] Section 11, now section 12.

a "tote road", used only to bring in machinery for decking logs or for road construction. In other words, district staff did not consider a tote road to be a "road" for drainage control purposes. The Board disagrees. Tote road construction and modification has the potential to cause sedimentation. Fully functional drainage systems must be built *concurrent* with road construction. There is no distinction in the Code between tote roads and other roads and there is no logical basis for exempting tote roads from drainage control practices.

Although the Board disagrees with the district interpretation of legal requirements, drainage system problems were identified and corrected in the circumstances.

Finding 10:

Although compliance and enforcement staff incorrectly assumed that a tote road did not require fully functional drainage systems, district staff adequately and effectively investigated and dealt with concerns about the adequacy of road drainage and about the deposition of slash in a watercourse.

The regional team examined a road maintenance concern raised by the complainant. The soils in the area include a layer of up to one meter of fine volcanic ash. Such soils are prone to transport, which could result in the sedimentation of watercourses. District staff accepted that normal, regular road maintenance had to be augmented in the area by precautionary practices such as stabilizing road cuts with rock ballast, log cribbing or hydroseeding. District staff provided the licensee with direction on appropriate road construction and maintenance practices to minimize sedimentation by the ash soils. The regional team found that the licensee's road construction and maintenance regimes incorporated the recommended practices.

The regional team also reviewed district records of regular road permit inspections in the area. Past inspections did not indicate a road maintenance problem. The regional team went on to conduct a field review of the licensee's road maintenance practices and did not detect significant road maintenance issues.

The Board examined roads and found little evidence of past sedimentation. That observation supports the regional team's findings. Overall, the Board found no indication that past construction and maintenance practices, including drainage control, were inappropriate or ineffective.

Finding 11:

The regional team adequately investigated road maintenance constraints and practices. The Board finds that maintenance practices, including precautionary actions, were effective to prevent sedimentation despite the presence of fine soils.

The complainant was also concerned about one aspect of road deactivation. A bridge on a deactivated road had not been removed. The regional team concluded that the road in question

did not have to be fully deactivated; it was to be semi-permanently deactivated. Semi-permanent deactivation allows bridges to be repaired or replaced[10].

Finding 12:

The complainant asserted that the Code required removal of a bridge during road deactivation. The Board finds that this assertion was not substantiated.

D. Regional manager's enforcement obligations regarding forest practices

The complainant expressed concern about the limited role taken by the regional manager of the Ministry of Forests in responding to the complainant's concerns about the district manager's actions.

A regional manager, among others, has authority to enforce the Code. A regional manager is a "senior official" and can apply penalties and corrective orders. However, having that authority does not create an obligation to enforce. In the circumstances of this complaint, the regional manager left the district manager to enforce the Code. The regional manager provided the district manager with staff assistance to examine the forest practice concerns raised by the complainant. However, he chose not to review the district manager's enforcement actions directly in response to the complainant's concerns.

The Board finds that the regional manager had that choice. The district manager was taking action, assisted by the regional team, to address the concerns. Being familiar with the physiographic and ecological conditions of the district, the district manager was best able to enforce the Code.

Finding 13:

Although the regional manager has authority to enforce the Code, there is no obligation to do so. Deference to the district manager was appropriate in the circumstances.

Conclusions

With regard to the issues raised in this complaint, the Board makes the following conclusions:

1. In regard to the timeliness of district and regional response to the complainant's concerns and the adequacy of that response, the Board concludes that:

[10] *Forest Road Regulation*, section 21(d), provided that a person who carries out semi-permanent deactivation on a road must "protect road users during the period of deactivation by removing temporary and semi-permanent bridges or by repairing or replacing them".

a) District compliance and enforcement officials and a regional team, made up of ministry staff and an independent consultant, conducted timely and responsive investigations into concerns raised by the complainant. The Board is satisfied with the qualifications of the regional team and the teams' conclusions.

b) Although the government responded quickly to the concerns, the complainant was not informed of the actions taken. The complaint could have been avoided if the complainant had known how government had responded. Both parties had a responsibility to maintain effective communications.

2. In regard to the role of the regional manager in responding to the complainant's concerns, the Board concludes that regional managers have the same authority to investigate and make enforcement determinations as a district manager. However, there is no need to duplicate such work.

In response to the issues identified in the complaint investigation, the Board offers the following comments:

1. The Board stresses the importance of effective communication between the government and the public regarding the management of forest resources. Both have a responsibility to communicate and to attempt to resolve issues of concern. Government and the public each have a responsibility to act in a reasonable and courteous manner even if confronted by behavior that is considered inappropriate.

2. District and regional managers should maintain written documentation on responses to complaints by the public. District managers should also document reasons for deciding to depart from normal standards such as locating landings more than the minimum required distance from streams. The Board recognizes that detailed documentation of these decisions could create significant workload, so brief file notations would be acceptable as records.